No. 12247

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED ELIA IOB, SAMUEL M. DOBBS and WALDEMAR F. ULLRICH,

Appellants,

vs.

LOS ANGELES BREWING CO., INC., a corporation, *et al.*,

Appellees.

BRIEF OF APPELLEE LOS ANGELES BREWING CO.

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STATUTES

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Respondents.

BRIEF OF APPELLEE LOS ANGELES BREWING CO.

Statement of Facts.

At the time appellants left their employment for military service,* the collective bargaining agent representing the brewers and bottlers employed by respondent Los Angeles Brewing Co.** was the International Union of United

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*Appellants Iob, Dobbs, and Ullrich were first employed by The Company in March, 1943, July, 1937, and February, 1937, respectively. They left their positions for military service on February 24, 1945, January 17, 1942, and May 9, 1942, respectively [Tr. 208-209].

**The petition incorrectly designated respondent as Los Angeles Brewing Company, Inc. At that time respondent's correct name was Los Angeles Brewing Co. In June, 1948, respondent sold its brewing business to Los Angeles Brewing Company (a new corporation). Respondent's correct name is now Main Street Corporation. To avoid confusion the respondent will continue to be referred to herein as Los Angeles Brewing Co. or simply as respondent company.

Brewery, Flour, Cereal and Soft Drink Workers of America [Tr. 209]. Until 1941 this Union was an affiliate of the American Federation of Labor. From 1941 until sometime prior to July, 1946, it operated as an independent Union [Tr. 209]. Prior to their military service the appellants were required to be and were members of local Unions of the International Union as a condition of their employment [Tr. 209].

In April, 1946, the general executive board of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers determined to hold and did hold a national referendum of its members to determine whether it should affiliate with the Congress of Industrial Organizations. By a small majority nationally the members of the Union voted in favor of affiliation with the Congress of Industrial Organizations [Tr. 320-321]. This proposed action was not popular in California, however, for in this state approximately 90% of the members of the Union had voted against affiliation with the Congress of Industrial Organizations [Tr. 292, 320-321]. The Union members in California instructed the officers of their locals to make what arrangements they could to get back into the ranks of the American Federation of Labor [Tr. 321]. Prior to July 28, 1946, more than 90% of the respondent company's employees signed authorization cards designating locals (hereinafter referred to as "teamster locals") affiliated with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America as their agent for purposes of collective bargaining [Tr.

210, 316-317]. These cards were exhibited to and checked by the representatives of respondent company, and the teamster locals thereupon demanded that the company recognize them as the collective bargaining agent of the employees of the company and enter into a collective bargaining contract with them [Tr. 316-317]. The respondent company did recognize the teamster locals as the collective bargaining agent for its employees and on July 28, 1946, made and entered into a contract with them which contract, among other things, provided for a closed shop [Tr. 210-211].

Appellants Dobbs and Ullrich had returned to their jobs from their honorable military service on January 2, 1946, and April 29, 1946, respectively—both prior to the making of the closed shop contract of July 28, 1946. Appellant Iob returned to his job from his honorable military service on September 9, 1946 [Tr. 209]. Although the Union representatives solicited and importuned appellants to become members of the appropriate teamster local, which membership was required by the contract as a condition of continued employment, all of the appellants refused to become members [Tr. 215]. Upon such continued refusal and upon demand by the representative of the contracting labor organizations, respondent company discharged each of appellants [Tr. 215].* The respondent company was threatened with strikes and economic pressure if the demands to discharge appellants were not complied with [Tr. 215-216].

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*Appellant Iob was discharged on September 17, 1946, and, after a brief period of re-employment, was again discharged on November 25, 1946. Appellants Dobbs and Ullrich were discharged on October 5, 1946 [Tr. 215].

ARGUMENT.

Introductory.

Appellants take issue with the finding [Tr. 210] of the District Court that the teamster locals represented a majority of the employees of the respondent company at the time the closed shop contract was entered into, and they ask this Court to take judicial notice of a decision of the National Labor Relations Board in *Acme Brewing Co., et al.,* 72 N. L. R. B. 1005,* which decision, the appellants incorrectly assert, holds, contrary to the finding of the District Court , that on July 28, 1946, the teamsters locals did not represent a majority of the employees of respondent company. The National Labor Relations Board did not

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*Inasmuch as the appellants are now arguing the case on a theory of unfair labor practices, it would seem logical for this court to take judicial notice of the fact that unfair labor practice charges (Case No. 21-C-2871) were filed with the 21st Regional Office of the National Labor Relations Board against respondent company alleging that the same discharges of appellants which are the subject of the pending action (as well as discharges of other employees) were unfair labor practices in violation of Section 8(3) of the National Labor Relations Act and that the contract of July 28, 1946, was invalid under the National Labor Relations Act. (29 U. S. C. A. Sec. 158.) These charges were dismissed by the 21st Regional Office of the National Labor Relations Board after an investigation, and an appeal was taken therefrom to the General Counsel of the National Labor Relations Board, who affirmed the action of the 21st Regional Office of the Board. Prior to the signing of the findings of fact in the pending case these facts were brought to the attention of the District Judge by oral stipulation. We respectfully request that this Honorable Court take judicial notice of the facts recited above, and that we be given leave to submit certified copies of Charge No. 21-C-2871, as amended, and of the letters of the 21st Regional Office and of the General Counsel of the National Labor Relations Board dismissing the charge.

in the cited case, or in any other case, hold that the contract was invalid or that the teamster locals did not represent a majority of the employees of respondent company at the time said contract was entered into. In the cited case the National Labor Relations Board did hold on February 28, 1947, that the contract was not a bar to the holding of an election by the National Labor Relations Board to determine which union the employees wished to have represent them in the future as their collective bargaining agent. Patently, despite the assertion of appellants, this was not a holding that the contract was invalid or that on July 28, 1946, the teamster locals did not represent a majority of the employees of respondent company.

We propose initially to discuss the case on appellants' theory, and to show that the contract was perfectly valid under the National Labor Relations Act (29 U. S. C. A. 151-166), and that the discharges of appellants were not a violation of appellants' rights under the Selective Service and Training Act of 1940, as amended. Finally we shall discuss the question whether what appellants term the "main issue" (and the only issue argued in their brief) is properly before this Court.

I.

The Contract Was a Valid Closed Shop Contract and Appellants Were Properly Discharged for Refusing to Comply With It.

A. If the Union Presents to the Employer Satisfactory Evidence That It Represents a Majority of His Employees It Is Entitled to Recognition as the Collective Bargaining Agent. It Is Unnecessary That an Election Be Held or That the National Labor Relations Board Formally Certify the Union Before the Employer Can Bargain With the Union.

The uncontradicted evidence shows that the teamster locals had been designated as the collective bargaining agent by a majority of the employees of respondent company prior to the making of the contract of July 28, 1946 [Tr. 210, 291-292, 316]. More than 90% of the employees had signed cards designating the teamsters locals as bargaining agent, and these cards were exhibited to the representatives of respondent company as a basis for demanding the contract [Tr. 316]. In these circumstances it was proper for the company to recognize and bargain with the teamster locals.

It is true that the teamster locals had not been formally certified by the National Labor Relations Board and had not won an election, but neither of these conditions is a prerequisite to recognition or collective bargaining.

N. L. R. B. v. Remington Rand, Inc. (2d Cir., 1938), 94 F. 2d 862, 868;

N. L. R. B. v. Federbush Co. (2d Cir., 1941), 121 F. 2d 954;

N. L. R. B. v. Dahlstrom Metallic Door Co. (2d Cir., 1940), 112 F. 2d 756.

In the *Dahlstrom Metallic Door Co.* case, the Court of Appeals for the Second Circuit affirmed a finding of the National Labor Relations Board that the employer had unlawfully refused to bargain with the Union. The Court rejected the employers' contention that bargaining was not required in the absence of a certification by the National Labor Relations Board. The Court said (p. 757):

> "The evidence also supports the findings that respondent unlawfully refused to bargain collectively. The contention that bargaining was not mandatory until the Board has accredited Local No. 307 as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support. National Labor Relations Board v. Remington Rand, Inc., 2 Cir., 94 F. 2d 862, 868, certiorari denied 304 U. S. 576, 585, 58 S. Ct. 1046, 82 L. Ed. 1540. We do not mean that respondent had to bargain with any one claiming to represent a majority but adequate proof tendered by the claimant could not in good faith be ignored. The union offered to submit the signed membership cards, but this offer was not accepted. Respondent 'made no effort to learn the facts and took the chance of what they might be.' National Labor Relations Board v. Remington Rand, Inc., *supra,* 94 F. 2d at page 869."

Similarly in *Matter of L. B. Hartz Stores* (1946), 71 N. L. R. B. 848, the trial examiner, whose decision was affirmed by the National Labor Relations Board, stated (p. 871):

> "The Act is clear in intent, and it has been too well-established to require extended discussion, that election and certification proceedings are not the only method of determining majority representation, and

> that an employer may not require certification as a condition precedent to bargaining where the employer entertains no real doubt as to the Union's majority, or where reasonable proof is available and the employer makes no effort to ascertain whether the Union has a majority."

In the light of this long-standing rule, and in view of the evidence presented to the employer that the Union did represent a majority of the employees, we respectfully submit that the respondent company acted properly in recognizing and dealing with the teamster locals as the collective bargaining agent of its employees.

B, A Valid Collective Bargaining Contract Does Not Prevent the National Labor Relations Board From Ordering an Election to Be Held. A Holding That a Contract Is Not a Bar to An Election Is Not a Holding That the Contract Is Invalid.

Appellants assert that the National Labor Relations Board held in February 1947, on the basis of a petition filed in August 1946, that the contract pursuant to which appellants were discharged was not a bar to the holding of an election (Op. Br. pp. 11-12). They then assert that under all decisions of the National Labor Relations Board a contract made with a union which represents a majority of the employees is a bar to election proceedings. They conclude that since this contract was held by the National Labor Relations Board not to be a bar to an election it was therefore an invalid contract and the discharges of appellants were unlawful. Appellants' premise is fallacious and their conclusion a *non sequitur*.

The *Texas Co.* case (64 N. L. R. B. 653) cited by appellants (Op. Br. p. 11) is not authority for their premise

that a valid collective bargaining contract is a bar to an election. There the Board held that even assuming a "binding contract" was made on June 11, 1945 between the company and the Union, nevertheless such contract was not a bar to a current determination of representatives inasmuch as the rival union had filed its petition for an election with the Board prior to the effective date of the alleged contract.

The National Labor Relations Board has a rule in representation cases that an oral or unsigned contract, though perfectly valid, is not a bar to an election where the rival union files a representation petition.

> *Association of Motion Picture Producers,* 25 L. R. R. M. 1226, 87 N. L. R. B. No. 81 (1950);
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> *International Brotherhood of Teamsters, etc.* (1950), 25 L. R. R. M. 1202, 87 N. L. R. B. No. 30.

And yet the National Labor Relations Board also holds that such oral or unsigned contract is a defense against a charge of unfair labor practices.

> *International Brotherhood of Teamsters, etc.* (1949), 25 L. R. R. M. 1202, 1204, 87 N. L. R. B. No. 30.

The National Labor Relations Act empowered the Board to order an election to be held at any time when it determined that a question affecting commerce had arisen concerning the representation of employees. The existence or non-existence of a contract has never been deemed a

limitation on that power. The Act provided at the time in question:

> "(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." (29 U. S. C. A., Sec. 159.)

It is true that the Board often holds that an existing contract will be deemed by it to be a bar to an election for a reasonable time—this for the purpose of promoting stability in labor relations. But there is no requirement that the Board so hold, and there is a plethora of cases wherein it has ordered an election to be held despite the existence of a valid collective bargaining contract.

That a contract is not rendered invalid simply because the Board orders an election to be held follows from the decision of the Supreme Court in *Colgate-Palmolive-Peet Co. v. N. L. R. B.* (1949), 338 U. S. ....., 70 S. Ct. 166. In that case an election was ordered by the Board, and yet discharges made just prior to the election were held by the Supreme Court to be lawful, because made pursuant to the provisions of a closed shop contract.

C. Discharges Made Pursuant to a Closed Shop Contract Are Lawful Despite the Fact That a Question Concerning Representation Exists at the Time of Such Discharges.

On July 28, 1946, the closed shop contract was made with the teamster locals which had presented evidence to the employer that they were the designated representative of the majority of his employees [Tr. 210]. In August 1946 the International Union of United Brewery, Flour, Cereal and Soft Drink Workers (C. I. O.) filed a representation petition with the National Labor Relations Board requesting an election (Op. Br. p. 12). Appellants Dobbs and Ullrich continued to work after July 28, 1946 and until October 5, 1946 despite their refusal to become members of the Union as required by the contract. Appellant Iob was returned to his employment despite his refusal to become a member of the Union as required by the contract. All were solicited and importuned to join the contracting union and all refused. All were discharged for such refusal upon demand of the contracting union [Tr. 215]. In February, 1947, long after the discharges, the National Labor Relations Board ordered an election to be held (Op. Br. p. 11).

It is in the background of the foregoing facts that appellants request this court to reverse the District Court and declare that their discharges at the demand of the contracting union, which threatened strikes and economic pressure if the demands were refused [Tr. 216], were nevertheless discharges "without cause" under the Selective Training and Service Act (50 U. S. C. A. App., Sec. 308(e)).

Contrary to the contentions of appellants, however, the existence of a question concerning representation at the

time of a discharge pursuant to a closed shop conrtract does not render such discharge unlawful.

Colgate-Palmolive-Peet Company v. N. L. R. B. (1949), 338 U. S. ....., 70 S. Ct. 166.

In the *Colgate-Palmolive-Peet Co.* case a number of employees were discharged pursuant to a closed shop contract with the C. I. O. union, despite the fact that at the time of such discharges a representation petition filed by the rival A. F. L. union was pending before the National Labor Relations Board, which had already held a hearing upon the A. F. L. union's petition. Thereafter the National Labor Relations Board conducted an election, which was won by the C. I. O. union. Later the Board set the election aside on the ground that the discharges of employees made at the request of the C. I. O. union had wrongfully influenced the vote at the election. Yet the Supreme Court declared that these discharges were lawful.

The case of *Ellis Canning Company* (1948), 76 N. L. R. B. 99 is also in point. Here the company made a closed shop contract with the A. F. L. union in August 1945. Prior to April 1946 by oral understanding between the company and the union, the union did not insist on enforcement of the closed shop provisions. In January 1946, the C. I. O. union filed a representation petition with the National Labor Relations Board, and in March 1946 hearings were held on the petition of the C. I. O. union. In April 1946, the A. F. L. union insisted on enforcement of the closed shop provisions of its contract and on April 10, 1946, a number of employees were accordingly discharged for failing to be members of that union. On April 16, 1946, the National Labor Relations Board ordered an election to be held.

Following the discharges of the employees on April 10, 1946, the C.I.O. Union filed unfair labor practice charges against the employer in which it contended that the revival of the closed shop provision of the August, 1945, contract, and the discharge of the employees pursuant thereto in the face of the pending representation proceedings, was a violation of the National Labor Relations Act. The National Labor Relations Board held otherwise, and affirmed the decision of the trial examiner, whose opinion states (pp. 113-114):

> "Had the respondent in January, 1946, after the petition had been filed by the CIO, fired CIO members on request of the AFL, or in April on reopening the plant had respondent refused reemployment to CIO members who were willing to join the AFL, the position of counsel for the Board would be more tenable. These facts are not before us, however. No one was discharged for joining the CIO in January, 1946, and in April every employee on the February pay roll was recalled to work and every one who reported was requested to join the AFL regardless of their activities on behalf of the CIO. There is no showing that all employees on the February pay roll would not have been reemployed on April 10 had they joined the AFL, and no showing that after joining the AFL they could not have affiliated with, campaigned for, and voted for the CIO without hindrance from respondent. Without such proof the *Rutland Court* line of decisions is inapplicable herein."

In the instant case it is also worthy of note that there is no evidence that appellants could not have joined the teamster locals as they were requested to do, and yet remained affiliated with their C.I.O. union. In these circumstances appellants' assertion that they were confronted with a "Hobson's choice" is a euphemistic but inaccurate descriptive term.

There are, of course, numerous cases in which the National Labor Relations Board has held that the employer may discharge, refuse to reinstate, or refuse to employ anyone who does not have membership in the contracting union which has a closed shop contract with the employer.

Aeolian-American Corporation (1938), 8 N. L. R. B. 1043;

Mead Corporation (1943), 52 N. L. R. B. 1361;

General Furniture Manufacturing Company (1940), 26 N. L. R. B. 74.

In the *General Furniture Manufacturing Company* case, *supra,* it appeared that the President of the United Brotherhood of Carpenters and Joiners of America, A.F.L., caused the charter of the local union with which the employer had a closed shop contract to be suspended, and three days later created a new local union to succeed to the rights of the old. All but five of the employer's 189 employees thereupon shifted membership from the old local to the new. At the request of the new local, three of these five employees were refused reinstatement after a temporary lay-off, and the other two were discharged because they were not members of the new local. The National Labor Relations Board held that, because of the failure of the five to comply with the closed shop conditions, the discharges and refusals to reinstate were lawful.

We respectfully submit that under decisional authority and the law, the discharges of appellants were not unlawful, unless it can be said that veterans, as such, by virtue of the Selective Service and Training Act of 1940, as amended (50 U. S. C. A., Sec. 308), are freed from the obligation, which is imposed on all other employees, to conform to the terms of a collective bargaining contract.

II.

The Discharges of Appellants Were Not "Without Cause" Under the Selective Service and Training Act of 1940, as Amended.

A. A Closed Shop Contract Applies to Returned Veterans Just as It Does to All Other Employees.

The following are the pertinent statutory provisions which guarantee certain rights and privileges to returned veterans:

> "(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
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> * * * * * * * *
>
> "(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
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> * * * * * * * *
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> "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances

have so changed as to make it impossible or unreasonable to do so:

* * * * * * * *

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. * * *." (54 Stat. 885, 890, as amended, 50 U. S. C. A., 308.)

There is no language in the Act to indicate that veterans as such are to be freed from obligation of conforming with the closed shop provisions of a collective bargaining contract between the employer and the union, and the few courts which have passed on the question have uniformly held that the veteran, like all other employees, is subject to the provisions of such a contract.

In *Kemp v. John Chatillon & Sons, Inc.* (3rd Cir. 1948), 169 F. 2d 203 at 207, the Third Circuit Court said:

"Upon consideration of all the circumstances of the instant case and applying the test indicated we are of the opinion that Kemp's discharge was not 'without cause' within the purview of the statute. Chatillon had entered into a binding and legal closed-shop agreement with the Union. The Union insisted that Kemp join its membership or be discharged. If

> Chatillon had insisted upon retaining Kemp in employment it would have breached the terms of its contract with the Union. Moreover, it would have run a substantial risk of disrupting its labor relations and it might reasonably have anticipated a strike at its plant."

In *Droste v. Nash Kelvinator Corporation* (E. D. Mich. 1946), 64 Fed. Supp. 716, the Court noted that there is no reason to assume that in the enactment of the Selective Service and Training Act Congress intended to suspend for veterans the provisions of the National Labor Relations Act. The Court said at page 721:

> "There is no reason to believe that Congress intended to amend or repeal any part of the National Labor Relations Act when it passed the Selective Training and Service Act. No parts of the former Act are specifically repealed by the latter, and repeals by implication are not favored. United States v. Borden Co., 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181."

In *Bozar v. Central Pennsylvania Quarry, Strip. and Constr. Co.* (M. D. Pa., 1947), 73 Fed. Supp. 803, the Court held that the veteran was properly denied his previous employment because he was not a member of the Union which upon his return had a closed shop contract with the employer. The Court also noted that the veteran was not "qualified," as that word is used in the Act because he lacked union membership. The Court said at page 810:

> "There is nothing in the Act which precludes respondent from entering into the coal company contract or from entering into the closed shop agreement with the union. Long before petitioner was engaged by respondent it had been the practice of respondent to accept contracts from coal companies and to agree

to the conditions of the 1939 agreement. There was certainly no intention on the part of Congress to stop such a course of business. To quote Mr. Justice Rutledge under circumstances other than those here present. 'We do not think Congress had in mind such far-reaching consequences for the nation-wide system of employment, both public and private, when making the statutory provisions for the veteran's benefit.' Trailmobile Co. v. Whirls, *supra.*"

* * * * * * * *

"Webster's New International Dictionary, Second Edition, defines 'qualified' as *inter alia,* 'Having complied with the specific requirements of precedent conditions for an office, appointment, employment, etc.' See Trusteed Funds, Inc., v. Dacey, 1 Cir., 1947, 160 F. 2d 413, at page 420, holding that 'qualified' means more than 'simply physically and mentally qualified.' "

In the pending cause appellants were similarly not qualified, for they lacked union membership, a requirement of employment.

All of the decisions of which we are aware hold that the veteran is subject to the terms of the collective bargaining contract so long as it does not discriminate against him as a veteran and accords him the same privileges that are available to the rest of the employees. This is the plain effect of the Supreme Court's decision in *Aeronautical Lodge v. Campbell* (1949), 337 U. S. 521, 69 S. Ct. 1287.

The Selective Service and Training Act provides only that the veteran shall be restored to his position without loss of seniority, and with the right to participate in insurance and other benefits offered by the employer, and

that he shall not be discharged without cause. No claim is made by appellants that they were denied seniority rights or insurance or other benefits. Their sole complaint is that they, like all other employees, were required to be a member of the union of the employees in order to continue in their employment. In the absence of any language in the Selective Service and Training Act, it cannot be assumed that Congress intended, in so far as veterans are concerned, to suspend the provisions of the National Labor Relations Act which authorized the making of a collective bargaining contract requiring union membership as a condition of employment. If such an assumption could be made, it would be as logical to assume that Congress intended to suspend for veterans such laws as require a license to drive a truck, pilot an airplane, or work as a plumber.

No one would seriously contend that a discharge of a veteran who was a truck driver because he failed to have a driver's license, or of a pilot for failure to have a pilot's license, would be "without cause," yet we cannot see any difference between that situation and the case of appellants who, despite the contractual requirement of union membership, which contractual requirement was authorized by the National Labor Relations Act, nevertheless refused the proffered union membership.

B. A Refusal by the Employer to Discharge Appellants Would Have Been a Breach of the Contract With the Union and Would Probably Have Resulted in a Strike. In These Circumstances the Discharges Were Not Without Cause.

The discharge of appellants upon the demand of the union was a contractual obligation of the respondent. Moreover, the Union's demands were accompanied by a threat of strikes and economic pressure if the demands were not complied with [Tr. 215-216]. It is significant that appellants had it within their power to avert the discharges or the breach of contract or the threatened strike by simply joining the Union as they were requested to do. They elected not to do so, despite knowledge that without such membership the company could not keep them in its employ [Tr. 216]. The employer, on the other hand, had no power to solve the problem. It had no alternative but to discharge appellants. In these circumstances, we submit, the employer had "cause" to discharge appellants.

In *Keserich v. Carnegie-Illinois Steel Corporation* (7th Cir. 1947), 163 F. 2d 889, Judge Minton discussed the meaning of the phrase "without cause," as used in the Selective Service and Training Act of 1940, in the following language (p. 890):

> "* * * The cause intended by the statute does not have to be a legal cause. It may be such cause as a fair-minded person may act upon, and where such action is not arbitrarily taken with a purpose or as an excuse to avoid the statute, it is cause within the meaning thereof."

The foregoing language of Justice Minton's was quoted with approval by the Court of Appeals for the Third Circuit in the *Kemp v. John Chatillon & Sons, Inc.*, case (169 F. 2d 203, 207). The Court of Appeals for the Third Circuit noted that Justice Minton's views were entitled to particular weight for when the Selective Service and Training Act was enacted by the Congress, Justice Minton was one of the Senators in charge of the Senate bill, which contained the "without cause" language, and he was also a member of the Conference Committee which resolved the differences in the bills of the Senate and the House of Representatives. The Court of Appeals for the Third Circuit also discussed the meaning of the statutory phrase "without cause" as follows:

> "We think that the word 'cause' as used in the statute does not necessarily mean 'legal' cause; that is to say, a cause which would furnish the employee with a cause of action against his employer because of a dismissal or discharge. On the other hand we are of the opinion that the cause may not be a mere excuse or an arbitrary action on the part of the employer to avoid the impact of the statute." (169 F. 2d 203, 206.)

We respectfully submit that under no circumstances could it be said that the employer in the pending cause took action arbitrarily "with a purpose or as an excuse to avoid the statute." On the contrary, the discharges of appellants were reasonable ones under the circumstances, and were not "without cause."

III.

This Action Was Tried and Submitted on the Theory That the Contract as a Collective Bargaining Contract Was Valid. Appellants Are Now Requesting This Court to Review the Case on a Different Theory.

A. Statement of Facts for the Purpose of Considering This Question.

The Petition for Enforcement of Veterans' Reemployment Rights [Tr. 2-9] was filed in the District Court on January 23, 1947. The Answer of Los Angeles Brewing Co. [Tr. 9-41] was filed and served on February 23, 1947. The petition alleged that appellants were discharged because they were not members of the teamsters union. There was no allegation that the closed shop contract pursuant to which appellants were discharged was invalid. The cause came on for trial on April 1 and April 2, 1947, and evidence both oral and documentary was offered by both parties and received by the Court. No evidence was offered to show that the contract as a contract was invalid. Evidence was offered by the respondent company, and it was received [Tr. 291-292, 316], to show that the contract was made with the union which at the time the contract was made represented for purposes of collective bargaining more than 90% of the company's employees. No contrary evidence was offered. No contrary contention was made. On April 2, 1947, the District Judge, Honorable Paul J. McCormick announced from the bench that he was prepared to deny the relief prayed for [Tr. 44].

Thereafter appellants made a motion for a new trial [Tr. 45], requesting leave to add the teamster locals as additional respondents. The grounds urged for the motion were as follows:

> "That since the trial of this case and the oral announcement of the Court's opinion on April 1, 1947, the Supreme Court of the United States, in the case of Trailmobile Co. v. Whirls, decided April 14, 1947, held that during a veteran's statutory year of reemployment his restored rights cannot 'be altered adversely by the usual processes of collective bargaining,' thereby confirming petitioners' claim that their discharges were unlawful, *notwithstanding the agreement entered into in July, 1946,** between the respondent and the proposed additional respondents named in the motion."

This motion was granted on May 19, 1947 [Tr. 47]. Thereafter on May 28, 1947, an Amended Petition for Enforcement of Veterans' Reemployment Rights was filed [Tr. 49-61] and answers thereto were duly filed by the respondents [Tr. 99-122; 123-140]. It is true that the Amended Petition did make the validity of the closed shop contract an issue. The amended petition alleged [Tr. 53] that the July 28, 1946 contract was not a valid closed shop contract; that the National Labor Relations Board had not certified the teamster locals as the collective bargaining agent; and that said Board had not and did not prior to December 1946, determine the appropriate unit for purposes of collective bargaining. The answers alleged [Tr. 114-116; 129-131] that the contract was valid; that a certification by the National Labor Relations

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*Emphasis added.

Board is not necessary to impose on the employer the duty to bargain with the representative of a majority of his employees; and that the National Labor Relations Board had found that the unit covered by the July 28, 1946 contract was an appropriate unit for purposes of collective bargaining.

The only evidence offered or received in the case thereafter was on June 5, 1947 [Tr. 64; 362-367]. No evidence was offered to show that the contract was invalid; that the teamster locals were not the duly designated representatives of a majority of the company's employees at the time the contract of July 28, 1946 was made; or that the bargaining unit covered by the contract was not an appropriate unit for purposes of collective bargaining.

The matter was continued from time to time, and on December 23, 1948 the District Judge read his Memorandum of Decision [Tr. 199-207] in which he found that a majority of the company's employees had, prior to the making of the July 28, 1946 contract resigned from the International Union of United Brewery, Flour, Cereal and Soft Drink Workers and had organized and joined the teamster locals, and that the company and the teamster locals duly negotiated the July 28, 1946 contract. The findings of fact and conclusions of law were signed on December 31, 1948.

Further *indicia* that what appellants now label the "main issue" was not heretofore deemed an issue is found in the fact that the Statement of Points on Which Appellants Intend to Rely on Appeal [Tr. 386-387] did not even list this "main issue" as a point at all. Similarly, the Affiadvit for Extension of Time to Perfect and Docket Appeal [Tr. 382-385], wherein the nature of the case

is described, indicates clearly that the validity of the contract as a contract was not deemed an issue on appeal.

Appellants have apparently abandoned now the two contentions which they urged in the District Court, namely:

(1) Union membership cannot validly be required of a returned veteran during his statutory reemployment year, and his discharge, for lack of such membership, at the demand of the Union which represents the employees and has a closed shop contract with the employer, is a discharge "without cause" under Section 8(e) of the Selective Service and Training Act of 1940, as amended (50 U. S. C. A. App., Sec. 308(e)) and Section 7 of the Service Extension Act of 1941 (50 U. S. C. A. App., Sec. 357).

(2) In any event this contract did not by its terms require union membership of returned veterans.

The abandonment now of the first ground urged in the District Court is perhaps understandable in view of the decision in *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337 U. S. 521, 69 S. Ct. 1287, where the Supreme Court declared that the veteran's rights are subject to the normal collective bargaining contract so long as the contract expresses the honest desires for the protection of the interests of all members of the union and is not a skillful device for hostility to veterans. The Court noted that the Act protects the veteran "from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough,' but he is not to be favored as a furloughed employee as against his fellows" (337 U. S. at 526).

The abandonment now of the second ground urged in the District Court is also understandable in view of the express terms of the contract [Tr. 211].

We respectfully submit that the record discloses the ground now urged as the "main issue" is in effect a request that this Court review the case on a new theory.

B. This Court Will Not Review a Case on Appeal on a Theory Different From That on Which It Was Tried Below.

There are a number of decisions wherein this Court has declared the principle stated above.

> *United States v. Kettenbach* (9th Cir., 1913), 208 Fed. 209, 213.

This case was an action to declare certain land patents fraudulent and void. The statute prohibited purchase of the land for speculation and required that the land be appropriated to the purchasers' exclusive use and benefit. The complaint alleged and the case was tried by the government on the theory that the purchasers had intended the land to inure to the benefit of persons other than themselves. On appeal the government urged the patents be declared fraudulent and void because the evidence established that they were purchased for purposes of speculation. This Court refused to review the case on this new theory of the government's.

In *Ford Motor Co. v. Farrington* (9th Cir., 1917), 245 Fed. 850, this Court declared at pages 852-853:

> "The major part of appellant's brief is devoted to the question whether or not its 'agency contract' is obnoxious to the anti-trust laws, and therefore void; but, in view of the fact that the cause was tried and

> submitted upon the theory that the contract was valid, and that the rights of the parties were defined and were to be measured thereby, the inquiry is thought to be immaterial."

In *Brown v. Gierney* (1906), 201 U. S. 184, 190, 26 S. Ct. 509, the Supreme Court declared that a fact assumed as true in the trial court could not be contested in the appellate court. Similarly, this Court declared in *Wilson v. Byron Jackson Co.* (9th Cir. 1938), 93 F. 2d 572, 573, that a fact conceded throughout the trial could not be disputed on appeal.

We respectfully suggest that the principle declared in these cases should be applied to the pending cause where, although the amended petition did technically raise the issue, nevertheless no evidence was offered by appellants with respect thereto: the issue was not made one of the points on which appellants declared they intended to rely on appeal, and it is a different theory upon which this Court is now requested to review the case.

Conclusion.

Although appellants have attempted, on appeal, to convert their action from one under the Selective Service and Training Act of 1940 to an unfair labor practice proceeding, which is an issue and a theory not properly before this Court, nevertheless, we respectfully submit, it is clear from the record that the contract was made with a union representing a majority of the employees of the company; it was a valid contract; and appellants were lawfully discharged for failing and refusing to become members of the contracting union as required by the contract as a condition of employment.

A discharge of a returned veteran for refusal to join the union is not a discharge without cause where such action is taken pursuant to the demand of the union which has a valid closed shop contract with the employer and has threatened strikes and economic pressure if the contract should not be enforced. Appellants, who could have avoided their discharges simply by joining the contracting union, and who were treated in the same manner as all other employees, were not discharged "without cause."

For these reasons, we respectfully submit that the judgment appealed from should be affirmed.

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